Supreme Court, U.S.
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NO. 92-1246

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JOHNSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, and LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS RESPONSE BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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The facts of this case place two issues squarely before this Court. The first is whether Petitioners were entitled to pre-or post-termination notice of the use of race or affirmative action when they were terminated from their public employment as tenured faculty members, under the principles enunciated by this Court in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)? Secondly, does a due process analysis by a court, in a race based termination of tenured public employment, create an exception to the requirement of strict scrutiny judicial review of the use of race and affirmative under *Wygant, supra.*?

Respondents Brief has not challenged the clear and unequivocal testimony of Petitioner's dean that he was told, because of affirmative action, he was to classify people on the basis of race and exempt "blacks and other minorities" from termination.[1] Respondents have never articulated a reason or a need to apply an affirmative action override to terminating tenured faculty under an alleged reduction in force, as none exists. Nor have Respondents challenged the clear and unequivocal testimony of their own administrative agents on the use of race and affirmative action to select Petitioners for

[1] "The only exception would be that it was clear, because of affirmative action, **blacks and other minorities would not be laid off**." (Emphasis added) [Deposition of Sam Kintzer, p. 33]. This quote and the deposition testimony of the use of race to select Petitioners is fully discussed in Petitioners' Brief, pp. 9-14.

termination.

At no time were Petitioners informed by Respondents that their selection for termination was affected by an affirmative action. Five years after their terminations, Petitioners discovered that Respondents had used an undisclosed affirmative action override criteria to select them for termination, in addition to the three factors claimed by Respondents. The testimony cited in Petitioners Brief [pp. 9-14] presents a *prima facia* case of a race-based termination under the rubric of affirmative action. Respondents have never challenged the testimony of their own agents. Nor have Respondents answered why an affirmative action override was necessary. Respondents only state that a "minority" was selected,[2] and that Petitioner Arganian had lower evaluations than the less senior minority candidate for termination.[3]

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[2] Respondents cite that the third person selected for termination was a Pacific Islander, and hence a minority. Respondents have failed to point out that under the college affirmative action policy, a Pacific Islander is not considered a minority any more than a person of Irish, Italian, German, Armenian, Slavic, etc., ethnic descent is considered a minority. [Respondents Brief p. 11].

[3] Respondents claim that Professor Arganian's evaluations were lower than Dr. Chiwocha's is unsupported by the record. Respondents have refused to divulge the data used by Dean Kintzer's to rank faculty for termination. The district court refused to rule on Petitioners two motions to compel production of the data.

Respondents base their defense on the assertion that a due process analysis of Petitioners' termination by the Court is sufficient to overcome any claim of race based termination, thus eliminating the need for strict judicial scrutiny of Respondents use of race and affirmative action. Respondents have failed to cite any authority that eliminates the need for strict judicial scrutiny whenever race and affirmative is used to terminate tenured public employment.

Respondents' claim that this Court should not grant certiorari because the issue of a race based termination under the Equal Protection Clause of the Fourteenth Amendment was not raised until after the Complaint was filed is defective for two reasons. First, Respondents failed to notify Petitioners of the use of race and affirmative action in the selection process to terminate them. Petitioners did not discover the use of race in their selection until five years after their termination, thus they could not have challenged it during any alleged due process "hearings" at the time of their terminations, nor base their Complaint upon this allegation.

Moreover, the alleged "hearings" cited by Respondents were not before Petitioner's Dean, who had selected them for termination under affirmative action, nor before the Board of Trustees, who actually voted to terminate them. At no time during the informal administrative grievance meetings,

which Respondents belatedly now claim were hearings,[4] were Petitioners ever notified that race and affirmative action had been use to select them for termination.

Additionally, Respondents, blocked by court order, any avenue of meaningful discovery in the immediate post-termination period [Appendix II pp. 118-119a]. Even at the arbitration of Petitioners' grievances, over a year later, Respondents did not inform Petitioners how race and affirmative had been a used in their selection for termination. This is why Petitioners' urge this Court to adopt a due process notice requirement whenever race and affirmative action is used to terminate tenured public employment.

Respondents' second defense to the Equal Protection claim is equally without merit. The district court and Sixth Circuit has had the question of the impermissible use of race before it both times it has ruled in this case. When the Sixth Circuit Court of Appeals reversed and remanded the district court's grant of Respondents' motion for summary judgment in July, 1990, Petitioners brought a motion for summary judgement on the impermissible use of race under an Equal Protection claim, and Respondents' unequivocal admission that they afforded Petitioners no pre-termination due process hearings. The district court refused to hear Petitioners motion and dismissed it, reaffirming its original grant of

[4] See footnote 5 for Respondents' admission.

Respondents motion for summary judgment. [Appendix **I** p. 48a].

Petitioners second appeal to the Sixth Circuit laid Petitioners' Due Process and Equal Protection claims squarely before the court. The Sixth Circuit rejected Petitioners claim of an unlawful race based termination, without a strict scrutiny analysis, as being "without merit." [Appendix **I**, p.10a].

Respondents justify their failure to give Petitioners of notice of the use of race to terminate them by claiming that Petitioners' received informal administrative grievance "hearings." Respondents are asking this Court to adopt a "totality of circumstances test" where race was used to terminated tenured public employment. This test would weaken the previous decisions of this Court where race and affirmative action was used to terminate employment, *Wygant, supra.*

The failure of Respondents to notify Petitioners that race and affirmative action was used in the process to select them for termination, and the failure of the Sixth Circuit and district courts to apply any strict judicial scrutiny to a race based termination, is the basis of Petitioners appeal to this Court.

Petitioners are asking this Court to hold that it is unconstitutional under the Equal Protection Clause of the

Fourteenth Amendment for Respondents to: 1). classify its tenured public employees by race, for the purpose of terminating only non-minority tenured employees; 2). fail to inform terminated tenured employees that race was used to select them for termination under this classification; 3). terminate tenured employees on the basis of race, under the rubric of affirmative action, in the absence of any compelling governmental interest; 4). claim a "totality of circumstances test" defense to an allegation of race based termination; 5). and to rule that the facts of this case do not provide an exception to the requirement that courts must apply strict judicial scrutiny when there is a claim of the use of race to terminate tenured public employees under affirmative action.

Respondents' claim that Petitioners received due process is also without merit. Petitioners never received due process because they were never informed of one of the essential underlying reasons for their selection for termination, i.e., race and affirmative action. No where do Respondents claim that they informed Petitioners of the use of race and affirmative action to select them for termination, yet Respondents own agents unequivocally testified as to the use of race in the selection process. The Due Process Clause of the Fourteenth Amendment cannot be satisfied if terminated tenured public employees are not given the reasons for their selection for termination and a meaningful chance to rebut

them either at a due process hearing or in a court of law.

Respondents have failed to inform this Court why, eight years after they terminated Petitioners, they repudiated their adamant and unequivocal admission that the college did not afford Petitioners pre-termination due process hearings.[5] On the eve of the evidentiary hearing in March 1991, Respondents reversed their entire defense and repudiated their previous admissions and sought to build a case upon actions they previously admitted that they did not take.[6]

The failure of the Sixth Circuit and the district court to consider this a disputed question of material fact precluding a grant of summary judgment may be due to the Sixth Circuit's lack of a standard of due process governing alleged economic reductions in force. The Sixth Circuit cited *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973), in its first opinion [Appendix I pp. 20-21a], and then rejected it in its second opinion [Appendix I p. 8a], as being the standard governing this case. The Sixth Circuit cited no other authority that it followed. The Sixth Circuit apparently

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[5]. Interrogatory No. 59. "Neither the College nor its agents provided Plaintiff David Arganian or Edward Taylor a hearing prior to their layoff, **nor were they entitled to any such hearing prior to their layoff**." [Emphasis added] (Answers to First Set of Interrogatories R-128).

[6] See footnote 5.

looked to see if Petitioners met with some administrator at the college prior to their termination and concluded that they had a due process hearing.

None of the grievance meetings cited by Respondents and in the Sixth Circuit's opinion, met the minimum standards of a due process hearings under any authority in any other circuit governing the termination of tenured professors under a claim of financial exigency. The grievance meetings are deficient as "hearings" because they were not with the person who selected Petitioners for termination, nor the Board of Trustees, who actually terminated Petitioners. Petitioners were not given a statement of the reasons and data used to select them, nor a meaningful time to prepare a rebuttal, nor an appropriate hearing forum to challenge the existence of a financial exigency and their selection under it.

Instead, the Sixth Circuit held that first and second step grievance meetings with administrators who did not know why Petitioners had been selected (the department chairperson), and administrators that could not supply the documents and data used to select them (personnel director and college attorney), constituted pre-termination due process. The Sixth Circuit's holding that these meetings met the minimum standard of due process conflicts with all circuits that have reviewed termination of tenured faculty under an alleged claim of financial exigency. [Petitioners'

Brief, pp. 27-28].

Petitioners were afforded no post-termination hearings, aside from arbitration over a year after Petitioners were terminated. At the request of the Respondents, arbitration was limited to contractual grievance matters, and not the constitutional questions. The arbitrator refused to hear or rule on statutory or constitutional issues.

Respondents have admitted that they have never given Petitioner Arganian a due process hearing on the termination of his independent grant of tenure outside of the labor agreement. Respondents have never attempted to repudiate this admission. Yet, the district court twice granted Respondents' motion for summary judgment, in spite of Respondents admitting that they did not hold a due process hearing on his independent grant of tenure that Respondents demanded that the arbitrator not consider the issues surrounding Petitioner's independent grant of tenure at arbitration. It is an uncontested fact that Petitioner Arganian has never been afforded any due process on his independent grant of tenure.[7]

Petitioners urge this Court to grant certiorari to

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[7] "Defendants admit that Plaintiff Arganian has never been notified by any officer or agent of LCC that his tenure has been terminated **nor has Arganian been afforded a hearing on his tenure rights prior to being terminated as a full-time professor**." [Defendants' Answer to Complaint, paragraph 22].

reaffirm a due process requirement under the principles of *Wygant, supra*. The facts of this case provide a compelling reason for a notice requirement and an appropriate vehicle for this Court to articulate the due process principles necessary to carry out this Court's mandate that race based, affirmative action, terminations be consistent with the principles and procedures contained in *Wygant, supra*. When compared to the loss of one's employment because of race, the burden on the employer to justify the use of race and affirmative action, with full and fair disclosure to the employee as to why and how race was used to select him, would be de minimums.

Respectfully submitted:

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